

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1

INQUIRY CONCERNING  
A JUDGE, NO. 03-14

RE: JAMES E. HENSON

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JUDGE JAMES E. HENSON-S REPLY TO THE REPLY FILED  
BY THE JUDICIAL QUALIFICATIONS COMMISSION

KIRK N. KIRKCONNELL  
KIRKCONNELL, LINDSEY, SNURE  
AND YATES, P.A.  
1150 Louisiana Avenue, Suite 1  
P.O. Box 2728  
Winter Park, FL 32790-2728  
Telephone: (407)644-7600  
Florida Bar No. 111988

WILLIAM R. PONALL  
KIRKCONNELL, LINDSEY, SNURE  
AND YATES, P.A.  
1150 Louisiana Avenue, Suite 1  
P.O. Box 2728  
Winter Park, FL 32790-2728  
Telephone: (407) 644-7600  
Florida Bar No. 421634

Attorneys for Respondent Judge

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS . . . . .	iii
ARGUMENT	
I. <u>THE HEARING PANEL-S FINDING OF GUILT ON COUNT TWO (ADVISING DIANA JIMENEZ TO FLEE) WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE</u> . . . . .	1
II. <u>THE HEARING PANEL IMPROPERLY CONSIDERED ACQUITTED CONDUCT AND UNCHARGED MISCONDUCT IN REACHING ITS DECISION AND MAKING ITS RECOMMENDATION TO THIS COURT</u> . . . . .	7
V. <u>PUBLIC REPRIMAND IS THE MOST SEVERE SANCTION APPROPRIATE FOR THE MISCONDUCT ACTUALLY COMMITTED BY JUDGE HENSON</u> . . . . .	10
CERTIFICATE OF SERVICE . . . . .	13
CERTIFICATE OF COMPLIANCE . . . . .	14

## **TABLE OF CITATIONS**

### **CASES**

### **PAGE(S)**

<i>Florida Board of Bar Examiners re G.J.G.,</i> 709 So. 2d 1377 (Fla. 1998).....	8
<i>In re Davey</i> , 645 So. 2d 398 (Fla. 1994).....	5,6,8
<i>In re Ford-Kaus</i> , 730 So. 2d 269 (Fla. 1999).....	10
<i>In re Garrett</i> , 613 So. 2d 463 (Fla. 1993).....	10
<i>In re Graziano</i> , 696 So. 2d 744 (Fla. 1997).....	1,5
<i>In re Johnson</i> , 692 So. 2d 168 (Fla. 1997).....	10
<i>In re a Judge</i> , 357 So. 2d 172 (Fla. 1978).....	5
<i>In re LaMotte</i> , 341 So. 2d 513 (Fla. 1977).....	5,10
<i>In re Norris</i> , 581 So. 2d 578 (Fla. 1991).....	10
<i>Mississippi Commission of Judicial Performance</i> <i>v. Osborne</i> , 876 So. 2d 324 (Miss. 2004).....	11-12

### **CONSTITUTION**

### **PAGE(S)**

Article V, Section 12, Florida Constitution.....	6,12
--------------------------------------------------	------

### **OTHER AUTHORITIES**

Rule 4-1.2, Rules Regulating the Florida Bar.....	6
Section 90.803, Florida Statutes.....	3

## ARGUMENT

### I. THE HEARING PANEL'S FINDING OF GUILT ON COUNT TWO (ADVISING DIANA JIMENEZ TO FLEE) WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The JQC failed to establish Judge Henson's guilt on Count Two by clear and convincing evidence. The evidence presented by the JQC was not credible, clear, distinct, or precise, and thus failed to support a conclusion that Judge Henson advised Diana Jimenez to flee the jurisdiction in order to avoid prosecution.

As previously asserted, this Court is required to study the record and independently assess the factual findings, conclusions, and recommendations of the JQC. Despite the JQC's repeated request that this Court defer to the findings and conclusions made by the Hearing Panel, those findings and conclusions are only entitled to great weight if they have been established by clear and convincing evidence. This Court retains the ultimate power and responsibility to make a determination in this case. See *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997).

The JQC's Reply unsuccessfully attempts to argue that the Hearing Panel's Findings and Conclusions on Count Two are supported by clear and convincing evidence. The indecisive, confused, and contradictory testimony of Diana Jimenez, Dr. Jimenez, and Robert Nesmith simply fails to support the Hearing Panel's conclusion.

The JQC attempts to bolster these three witnesses by referring to them as a teacher, doctor, and lawyer, respectively. (JQC's

Reply at 14). The JQC seeks to ignore the bias, prejudice, and interest of each of these three witnesses.

Diana Jimenez is a disgruntled, former client of Judge Henson who is now a convicted felon serving a 16-year prison sentence. Dr. Jimenez is unhappy with the results of his daughter's case. He has had a fee dispute with Judge Henson and has filed a bar grievance against the judge. Robert Nesmith is a lawyer who has had personal and professional differences with Judge Henson, has been the subject of multiple bar grievance proceedings, and has been suspended from the practice of law at least once.

**Diana Jimenez**

The JQC's assertion that Diana Jimenez testified that Judge Henson "regularly encouraged her to consider fleeing to Colombia" (JQC Reply at 9) is not supported by the record. Although the JQC cites page 71 of the record in support of this assertion, nothing on that page, or anywhere else in the record, actually provides such support. (T1 at 71).

In fact, Diana repeatedly testified that Judge Henson never told her to flee the jurisdiction. (T1 at 59-60, 67, 72, 76-78). Diana only came to "believe" that Judge Henson was trying to encourage her to flee after she reflected back on everything that happened, and after she had been sentenced and was serving her prison term. (T1 at 72).

Diana's mere "belief" on this matter is simply insufficient to

support a conclusion that Judge Henson advised Diana to flee the jurisdiction. Thus, the understanding that Diana claims to have reached after she was sentenced failed to establish Judge Henson's guilt on Count Two by clear and convincing evidence.

The JQC's attempt to use the testimony of Maria Jimenez to corroborate Diana's testimony is unavailing. (See JQC Reply at 12 n.2). As previously asserted, the deposition testimony of Maria Jimenez was inadmissible hearsay that should not have been considered by the Hearing Panel. Maria's testimony that she heard the word "extradition" at the August 2001 meeting in Judge Henson's offense was not admissible pursuant to Fla. Stat. ' 90.803(18)(a), because there is no evidence that Judge Henson was the individual that used the word. Accordingly, the testimony of Maria Jimenez should not be considered by this Court.

#### **Dr. Jimenez**

The JQC contends that Dr. Jimenez's testimony on the existence of an extradition treaty between the United States and Colombia was not contradictory. The JQC seeks to rely on an errata sheet to Dr. Jimenez's video deposition. (JQC's Reply at 8-9). The JQC, however, fails to provide the Court with a record citation showing that this errata sheet was introduced into evidence or shown to the Hearing Panel. Since there is no evidence that the Hearing Panel considered this evidence in reaching its decision, there is absolutely no basis for this Court to consider such evidence in its

review of the record. Moreover, the fact that Dr. Jimenez had to Acorrect@ his testimony at some later date shows that his testimony was neither clear, distinct, or precise.

**Robert Nesmith**

The JQC contends that the fact that Robert Nesmith was unable to remember the date of the conversation in which Judge Henson allegedly told him he had advised Diana Jimenez to flee the jurisdiction does not establish that Nesmith=s testimony was not credible. (JQC=s Reply at 12). The record establishes, however, that Mr. Nesmith was unable to recall the timing of that conversation and the date on which Judge Henson allegedly tried to Abuy his silence@ by referring him a drug case. As previously asserted, it seems unlikely that any reasonable person would be unable to recall the timing of these two extremely important, memorable, and allegedly incriminating statements by Judge Henson.

Moreover, the JQC ignores the fact that Mr. Nesmith failed to mention Judge Henson=s alleged attempt to Abuy his silence@ in his previous interview with the State Attorney=s Office. (T1 at 136-42; Exh. 6). Likewise, the JQC ignores the fact that Mr. Nesmith provided contradictory testimony about his interpretation of Judge Henson=s alleged comments about buying his silence. (T1 at 120-21, 155-56, 158-59, 175-76).

Finally, if Judge Henson had in fact told Mr. Nesmith that he had told Diana to flee the jurisdiction, and later offered to buy

Mr. Nesmith's silence, Mr. Nesmith had an ethical obligation to report that conduct to the proper authorities. He never made such a report. (Tl at 134-36). All of these issues, when coupled with the disagreements and animosity that existed between Judge Henson and Mr. Nesmith, call the credibility of Mr. Nesmith's testimony into serious question.

### **The JQC's Improper Propensity Argument**

The JQC improperly argues that the fact that Judge Henson admitted guilt on the allegation contained in Count One somehow provides support for a finding of guilt on Count Two. (JQC's Reply at 17-18). It is axiomatic that the acceptance of this propensity argument would improperly shift the burden of proof to Judge Henson, and would constitute a violation of Judge Henson's right to due process. See *In re Graziano*, 696 So. 2d 744 (Fla. 1997) (judge entitled to procedural and substantive due process during JQC proceedings); *In re a Judge*, 357 So. 2d 172, 180-81 (Fla. 1978) (judge may not be removed from office unless his constitutional rights are protected).

It is well-established that the JQC, and not the respondent judge, has the burden of proving each count of misconduct by clear and convincing evidence. See *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994); *In re LaMotte*, 341 So. 2d 513, 516 (Fla. 1977). The mere fact that a judge admits guilt on one count of misconduct in no way establishes his or her guilt on an entirely separate count

of misconduct. Accordingly, this Court should reject the JQC=s contention and independently consider the record evidence relating to the allegation contained in Count Two.

### **The Record Evidence Before the Hearing Panel**

The JQC failed to present clear and convincing evidence that Judge Henson advised Diana to flee the jurisdiction in order to avoid prosecution. At most, the evidence shows that Judge Henson discussed the issue of Diana fleeing the jurisdiction with her father, Dr. Jimenez, during a telephone conversation to which Diana was not a party. Since Judge Henson testified that he strongly recommended to Dr. Jimenez that Diana not flee the jurisdiction, that discussion was completely consistent with Judge Henson=s ethical obligations. See Rule 4-1.2(d), Rules Regulating the Florida Bar.

The testimony of Diana Jimenez, Dr. Jimenez, and Mr. Nesmith was contradictory, imprecise, confused, and lacked credibility. The testimony of these witnesses was insufficient to produce a firm belief, without hesitancy, that Judge Henson is guilty of advising Diana to flee the jurisdiction. See *Davey*, 645 So. 2d at 404.

The insufficient nature of the evidence in this case is highlighted by the fact that two members of the Hearing Panel dissented from the Panel=s finding of guilt on Count Two.\*

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\* The Florida Constitution requires that at least two-thirds of the six-member panel be in agreement before a judge may be removed from office. See Article V, Section 12(a), (b), FLA.

Accordingly, this Court, after independently reviewing the record, should reject the findings and conclusions of the Hearing Panel on Count Two, and conclude that there was insufficient evidence to support a finding of guilt against Judge Henson.

**II. THE HEARING PANEL IMPROPERLY CONSIDERED ACQUITTED CONDUCT AND UNCHARGED MISCONDUCT IN REACHING ITS DECISION AND MAKING ITS RECOMMENDATION TO THIS COURT.**

The Hearing Panel improperly considered both acquitted conduct and uncharged misconduct in making its findings, conclusions, and recommendation to this Court. The JQC's contention to the contrary is contradicted by the specific findings made by the Hearing Panel and the information the Panel chose to include in its written Findings, Conclusions, and Recommendations.

First, the JQC incorrectly asserts that the Hearing Panel did not consider evidence relating to the allegation that Judge Henson failed to properly convey the State's 12-year plea offer to Diana Jimenez. Despite finding Judge Henson not guilty of this allegation, the Hearing Panel explicitly noted that it remained uncertain whether Henson clearly and directly conveyed this 10-12 year plea offer to Diana Jimenez.<sup>6</sup> (JQC Findings at 20). Instead of treating Judge Henson as if he had been completely exonerated of

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CONST.. Therefore, the recommendation of removal in the instant case is only supported by the bare minimum number of panel members.

this allegation, the Hearing Panel explicitly noted that the evidence on this issue was unclear.

The JQC's claim that Judge Henson raised this issue in his initial Response to this Court's Order to Show Cause without a citation to the record is also without merit. Judge Henson provided the Court with a citation to the Hearing Panel's improper reference to this issue in the Statement of Case and Facts contained in his Response. (Judge Henson's Response at xxiv).

Next, the JQC's contention that the Hearing Panel did not improperly consider evidence concerning the allegations that Judge Henson advised Jerry Lee Thompson and Hector Rodriguez to flee the jurisdiction is in error. Despite the fact that the Hearing Panel found Judge Henson not guilty of those charges, the Panel still felt the need to note that it was troubled by Bail Bondsman Rojelio Candelaria's involvement in all three cases (Jimenez, Thompson, and Rodriguez). (JQC's Findings at 24-25). If the Hearing Panel did not consider this evidence in making its recommendation to this Court, there was absolutely no reason to include it in its Findings, Conclusions and Recommendations.

Finally, the JQC's assertion that the Hearing Panel did not improperly consider Judge Henson's alleged untruthfulness before the panel also lacks merit. It is well-established that lack of candor may only be used as a basis for removal or reprimand if it is formally charged and proven. See *Davey*, 645 So. 2d at 406; See

*also Florida Board of Bar Examiners re G.J.G.* 709 So. 2d 1377 (Fla. 1998).

In the instant case, the Hearing Panel made a specific finding that Judge Henson was untruthful in his testimony before the Panel. (JQC's Findings at 11). Such a finding was unnecessary because the Hearing Panel subsequently indicated that it rejected the testimony of Judge Henson and accepted the testimony of Diana Jimenez, Dr. Jimenez, and Mr. Nesmith. (JQC's Findings at 19). As previously asserted, the Hearing Panel's decision to include a specific finding of fact on the truthfulness of Judge Henson clearly establishes that the Panel improperly considered this issue as a separate basis to support its decision and recommendation to this Court.

As previously asserted, the Hearing Panel's consideration of acquitted conduct and uncharged misconduct deprived Judge Henson of his right to due process under the Florida and United States Constitutions. The fact that the Hearing Panel felt the need to consider this conduct, and specifically reference it in the Panel's Findings, Conclusions and Recommendations, further establishes that the evidence which was properly considered was insufficient to establish Judge Henson's Guilt on Count Two by clear and convincing evidence. Accordingly, this Court, in its independent review of the record, should take care to ignore the conduct improperly considered by the Hearing Panel, and should reject the Panel's conclusions and recommendation of removal.

V. **PUBLIC REPRIMAND IS THE MOST SEVERE SANCTION APPROPRIATE FOR THE MISCONDUCT ACTUALLY COMMITTED BY JUDGE HENSON.**

The JQC's contention that this Court should accept the Hearing Panel's recommendation that Judge Henson be removed from office lacks merit. The JQC's argument is based on the erroneous conclusion that the Hearing Panel properly determined that Judge Henson's guilt on Count Two (advising Diana Jimenez to flee) was established by clear and convincing evidence.

Since the JQC actually failed to present clear and convincing evidence of Judge Henson's guilt on Count Two, none of the caselaw cited by the JQC applies to the instant case. The misconduct committed by the judges in *In re Ford-Kaus*, 730 So. 2d 269 (Fla. 1999), *In re Graziano*, 696 So. 2d 744 (Fla. 1997), *In re Garrett*, 613 So. 2d 463 (Fla. 1993), *In re LaMotte*, 341 So. 2d 513 (Fla. 1977), and *In re Johnson*, 692 So. 2d 168 (Fla. 1997), was all far more serious than the misconduct which Judge Henson has admitted.

As previously asserted, the misconduct admitted by Judge Henson (accepting the Jimenez case while he was still a county court judge) does not establish that he is presently unfit to hold judicial office. Although serious, the misconduct actually committed by Judge Henson had no effect on actual litigants and did not result in prejudice to anyone's rights. See *In re Norris*, 581 So. 2d 578 (Fla. 1991).

Moreover, since the JQC has failed to establish Judge Henson's

guilt on Count Two by clear and convincing evidence, there is no pattern of misconduct, but merely a single isolated incident of misconduct. Therefore, the wealth of caselaw cited by the JQC in support of its contention that this Court should consider the cumulative weight of Judge Henson's two instances of misconduct is inapplicable.

The instant case is similar to *Mississippi Commission of Judicial Performance v. Osborne*, 876 So. 2d 324 (Miss. 2004). In *Osborne*, a judge violated the Canons of the Mississippi Code of Judicial Conduct by practicing law after he had been appointed to the bench as a county court judge. The judge filed eight complaints with various courts in the six months after he was appointed to his position as a judge. The Mississippi Supreme Court rejected the Commission Attorney's contention that the judge should be removed from office. The Court concluded that the judge was not abusing the power of his judicial office and imposed the sanction of a public reprimand.

The misconduct admitted by Judge Henson in this case is similar to that of the judge in *Osborne*. Like the judge in *Osborne*, Judge Henson improperly practiced law while he was a county court judge. Judge Henson did so when he accepted the Diana Jimenez case shortly before the end of his term as a county court judge. Although this was a serious incident of misconduct, Judge Henson only accepted the Jimenez case after he had moved out of his

judicial office, and after he had wrapped up his judicial duties. Judge Henson's misconduct was not an abuse of his judicial power, did not affect any litigants, and did not result in prejudice to anyone's rights.

Accordingly, Judge Henson's admitted guilt on this count of misconduct does not establish that he is presently unfit to hold judicial office. See Article V, Section 12(c)(1), FLA. CONST. Like the Court in *Osborne*, this Court should conclude that the appropriate sanction for Judge Henson's conduct is a public reprimand.

The Hearing Panel has already stated that such a reprimand may be the appropriate sanction for a finding of guilt solely on Count One. Since that is the only allegation of misconduct which has actually been proven by clear and convincing evidence, a public reprimand is the sanction that should be imposed.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of this Reply has been provided by U.S. Mail to MARK HULSEY, ESQ. and E. LANNY RUSSELL, ESQ., Special Counsel for the Florida Judicial Qualifications Commission, Smith Hulsey & Busey, 225 Water Street, Suite 1800, Jacksonville, Florida 32202; THOMAS C. MACDONALD, JR., General Counsel, Judicial Qualifications Commission, 1904 Holly Lane, Tampa, FL 33629; and BROOKE KENNERLY, Executive Director, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303, on this 25th day of April, 2005.

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KIRK N. KIRKCONNELL  
KIRKCONNELL, LINDSEY, SNURE  
AND YATES, P.A.  
1150 Louisiana Avenue, Suite 1  
P.O. Box 2728  
Winter Park, FL 32790-2728  
Telephone: (407)644-7600  
Florida Bar No. 111988

---

WILLIAM R. PONALL  
KIRKCONNELL, LINDSEY, SNURE  
AND YATES, P.A.  
1150 Louisiana Avenue, Suite 1  
P.O. Box 2728  
Winter Park, FL 32790-2728  
Telephone: (407) 644-7600  
Florida Bar No. 421634

Attorneys for Respondent Judge

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Reply is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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KIRK N. KIRKCONNELL  
KIRKCONNELL, LINDSEY, SNURE  
AND YATES, P.A.  
1150 Louisiana Avenue, Suite 1  
P.O. Box 2728  
Winter Park, FL 32790-2728  
Telephone: (407)644-7600  
Florida Bar No. 111988

---

WILLIAM R. PONALL  
KIRKCONNELL, LINDSEY, SNURE  
AND YATES, P.A.  
1150 Louisiana Avenue, Suite 1  
P.O. Box 2728  
Winter Park, FL 32790-2728  
Telephone: (407) 644-7600  
Florida Bar No. 421634

Attorneys for Respondent Judge